Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1022

ALFRED DAVID CROWELL, *Petitioner*

v.

UNITED STATES OF AMERICA, *Defendant*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming judgment of conviction.

OPINIONS BELOW

The Court of Appeals for the Fourth Circuit affirmed the judgment of conviction by published opinion, reprinted herein as Appendix A (pages A-1-A-25), dated November 17, 1978, and reported at —— F.2d ——(Opinion No. 76-2323, decided November 17, 1978).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit affirming the judgment of conviction was made and entered on November 17, 1978. The jurisdiction of this Court is invoked under Title 28, U.S. Code Section 1254(1).

QUESTIONS PRESENTED

I

Did petitioner have a reasonable expectation of privacy with respect to his trash where he contracted for private trash collection for disposal at an appropriate dump?

II

Did petitioner have standing to challenge various searches where he had a possessory and proprietary interest in the property seized?

III

Did petitioner have standing to challenge various searches on the basis of his demonstrable interest in the property searched?

IV

Did petitioner have standing to challenge various searches on the basis that he was charged with interstate transportation of the seized evidence in furtherance of an unlawful activity where he had possessory and proprietary interest in the property seized?

V

Was petitioner's Sixth Amendment right to a fair trial violated by the trial court's refusal to individually voir dire the jury concerning prejudicial publicity?

VI

Was petitioner entitled to an evidentiary hearing on electronic surveillance notwithstanding government counsel's representation that no fruits of the surveillance would be introduced?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . .

STATEMENT

Petitioner was convicted by a jury of conspiracy to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense the controlled substance Phencyclidine (PCP) in violation of 26 U.S.Code 846 and 841(a)(1). In addition, petitioner was convicted of four separate charges of travelling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.Code 1952(a)(3), to-wit: he did, on four separate occasions, transport chemicals used in the manufacture of a Schedule III, a non-narcotic drug controlled substance.

As a consequence of an on-going narcotics investigation, law enforcement officers confronted a private

trash collector hired by petitioner. The collector turned over to the officers, at their direction, trash which had been removed from behind petitioner's house. A subsequent analysis of the contents of the trash revealed PCP. Based on this knowledge the officers obtained a warrant and searched petitioner's house where they seized a large quantity of PCP and other chemicals used to manufacture PCP. This evidence was introduced against petitioner at trial.

In addition, the testimony revealed that a search warrant was executed at a house in Spotsylvania County, Virginia where additional materials and chemicals were seized. The evidence showed that although petitioner was neither the owner nor was he present during the search, he did, however, store the evidence which belonged to him at the premises with the consent of the tenant. This evidence was introduced against petitioner in proof of the charge that he travelled in interstate commerce from Maryland to Spotsylvania County, Virginia and did transport chemicals which were the chemicals seized.

Another search warrant was executed at a shed located in Essex County, Virginia. The evidence proved that at least part of the incriminatory evidence seized had been purchased by petitioner. At the time of the search petitioner was neither the owner of the shed nor was he upon the property when it was searched. A voluminous quantity of drugs and chemicals were seized which were subsequently introduced against petitioner in further proof that he had travelled interstate transporting chemicals used to manufacture the illegal drug PCP.

In addition, the authorities executed a warrant on a U-Haul truck located in Maryland from which they

obtained various chemicals which, although not illegal under Federal or State law, could be used to manufacture the illegal drug PCP. On the basis of this seizure the authorities obtained and executed another warrant on petitioner's house where they seized additional evidence which, together with the truck evidence, was introduced at trial.

Petitioner attacked the various searches by pretrial motion. After hearing on petitioner's motions to suppress the Court ruled.

With respect to the search of petitioner's trash, the Court concluded that the trash had been abandoned and that, accordingly, there was no reasonable expectation of privacy. This result led to the denial of the motion as it related to the first search of petitioner's residence, the warrant for which was based primarily on the trash search.

The trial court further concluded that petitioner lacked standing to challenge the searches in Spotsylvania and Essex Counties, Virginia. The Court concluded that there were three bases for standing, to-wit: a) being on the premises at the time of the search; b) showing a proprietary or possessory interest in the premises; and c) being charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence. The Court concluded that notwithstanding the fact that petitioner was charged in four counts with transporting chemicals used to manufacture PCP interstate that this offense did not give rise to automatic standing even though he had been charged with the companion possessory charge in the State courts. The Court further ruled that accepting the fact that petitioner was the king-

pin of a PCP manufacturing ring, that at his direction the buildings referred to in the warrants were rented for use as manufacturing sites, that petitioner visited and had access to and control over the premises, that these facts were insufficient to establish a possessory or proprietary interest in the property searched. The Court relied on the fact that petitioner neither owned nor occupied the premises.

With respect to the search of the U-Haul, the Court concluded that on the basis of all that had gone before, including the results of the first house search, that there was probable cause to believe that the seized evidence was intended for an illegal use. Although the Court had the greatest difficulty with the second search of petitioner's house because of the lack of evidence linking the house to any illegal operation, it nonetheless denied petitioner's motion to suppress.

Thereafter, petitioner moved for a hearing on the use of electronic surveillance. The record revealed that the prosecutor appeared to be unaware of such surveillance until confronted with its existence at the pretrial hearings. Nonetheless the Court accepted the representations of government counsel that there were no fruits of such surveillance which were to be used and the Court, accordingly, denied petitioner's request for a hearing.

The last issue raised by petitioner was the trial court's failure to individually voir dire the impanelled jurors on the prejudice from newspaper articles published during trial. The Court ruled that a collective voir dire was adequate thereby denying petitioner's request for individual voir dire and sequestration.

Petitioner was convicted of conspiracy together with four counts of transporting chemicals interstate with intent to further an unlawful activity. Petitioner was thereafter sentenced to five years on each count with two counts to run concurrent and the others to be consecutive.

Petitioner appealed to the Court of Appeals for the Fourth Circuit noting a number of errors. The Court of Appeals considered the various contentions presented by petitioner. With respect to petitioner's challenge to the search of his trash, the Court considered the conflict between various State and Federal courts concluding that petitioner did not have a reasonable expectation of privacy in that no proof was introduced that he had made special arrangements for disposition of the trash, which finding is in apparent conflict with the record which showed a private trash contract with disposal at an appropriate facility.

The Court went on to consider petitioner's other challenges. Relevant here was the Court finding that petitioner did not have automatic standing to challenge the Spotsylvania and Essex County searches notwithstanding that he was charged with interstate transportation of chemicals to further an unlawful activity, to-wit: manufacture of PCP, in that possession was not an element of the crime. Additionally, the Court ruled that an allegation of a possessory interest in the items seized, standing alone, did not confer standing. As to petitioner's assertion of proprietary or possessory interest in the premises, the Court concluded that allegations that he was the principal of the conspiracy and that the co-conspirator was his agent was not sufficient. This finding disregarded the proven and accepted proffer of facts which were accepted by the trial court.

The Court concluded that the key was that one must be the victim of the search, and the record, both from the facts and from the accepted proffer, failed to show that he acquired a sufficient right of privacy to confer standing.

As relates to petitioner's argument concerning individual voir dire of jury panel members, the Court concluded that absent response to the collective voir dire, individual voir dire was not required even though the publicity was prejudicial.

Concerning the claim of denial of a electronic surveillance hearing, the Court stated that the representations of government counsel were sufficient to eliminate the need for a hearing notwithstanding the state of the record which clearly reflects that government counsel was unaware of the surveillance or resulting evidence until confronted by petitioner's counsel.

The Court of Appeals for the Fourth Circuit thereupon affirmed petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW REGARDING PETITIONER'S EXPECTATION OF PRIVACY OF HIS TRASH IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

In the instant case the Court of Appeals decided a fundamental issue concerning a person's right of privacy as it relates to his trash. The Court considered the conflict between a number of state cases [1] and various Federal cases which are distinguishable.[2] The Court of Appeals stated at p. 12:

> In accord with those cases, our view is that absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection.

The Court's ruling is in blatent conflict with the unrebutted evidence, which evidence clearly distinguishes this case from the other Federal Appellate decisions inconsistent herewith.

The record revealed that petitioner employed under contract a trash disposal company. It was petitioner's understanding, which was unchallenged, that the refuse would be taken to the appropriate disposal facility. The factual situation of the present case clearly distinguishes the case from conflicting authority which have found an abandonment based upon placing refuse at the curb for pick up. In the instant case, the private contract collector entered upon the property to gather the refuse for delivery to the appropriate disposal facility. Thereafter it was intercepted by the police. The refuse was not abandoned within the context of *United States* v. *Shelby,* 573 F.2d 971 (7th Cir., 1978), and petitioner had a reasonable expectation of privacy.

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[1] *People* v. *Krivda,* 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971); revacated, 409 U.S. 22, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972), reaffirmed, 8 Cal.2d 623, 105 Cal. Rptr. 521, 504 P.2d 457 (1973); *People* v. *Edwards,* 71 Cal. 2d 1096, 80 Cal.Rptr. 663, 458 P.2d 712 (1969); *U.S.* v. *Kahn,* 350 F.Supp. 784 (S.D.N.Y.), *Aff'd in part and rev'd in part,* 479 F.2d 290 (2nd Cir., 1973), rev'd 415 U.S. 239 (1974).

[2] *U.S.* v. *Shelby,* 573 F.2d 971 (7th Cir., 1978); *Magda* v. *Benson,* 536 F.2d 111 (6th Cir., 1972); *U.S.* v. *Mustone,* 469 F.2d 970 (1st Cir., 1972).

II. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Below Conflicts with the Decisions of this Court in *Rakas* v. *Illinois* (No. 77-5781, decided December 5, 1978) and *Jones* v. *United States*, 362 U.S. 257 (1960).

The Court of Appeals ruled that notwithstanding the proven facts that petitioner delivered chemicals which he owned and possessed to Essex County, Virginia, which testimony showed he had purchased and transported to New York, and which chemicals bore identifying initials showing that petitioner purchased them and that he directly, or through a co-defendant, had rented the shed, that he had complete access and control of the shed and that he visited the shed and that he had delivered chemicals he owned to Spotsylvania County, Virginia where he stored the evidence upon the property with the consent of the owners, nevertheless a possessory interest in the items seized, standing alone, did not confer standing to object to the two searches. The Court, in its opinion, relied upon *United States* v. *Jackson*, —— F.2d —— (Nos. 77-2530/31, October , 1978).

The ruling of the Court of Appeals is in apparent conflict with a number of decisions of this and other courts involving standing.

In *Cecil Jones* v. *United States*, 263 U.S. 257 (1960), Mr. Justice Frankfurter began his analysis of "standing" by referring to Judge Learned Hand's now famed "dilemma" stating:

> Men may wince at admitting that they were the owners, or in possession, of contraband property;

> may wish at once to secure the remedies of a possessor and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without questions. The petitioners at bar shrank from the predicament; but they were obliged to choose one horn of the dilemma. *Connolly* v. *Medalie*, 58 F.2d 629, 630 (2nd Cir., 1932).

In resolving that dilemma for the defendant in the case before the Court, Mr. Justice Frankfurter noted that the defendant should be conferred standing on two bases. First, because he was charged with a "possessory" crime and could not admit an interest in the property seized without incriminating himself, defendant would be conferred standing "automatically". Secondly, his lawful presence in the premises at the time of search provided a legally requisite interest in the premises to confer standing.

The Court, in *Jones*, certainly did not limit standing to the instances set forth in that case. Rather, it recognized that "standing" to challenge a seizure is gained by virtue of either an "interest in" the thing seized or an "interest in" the place searched.

With respect to standing conferred by an "interest in" the property seized, the Court in *Jones* held that one manner to achieve standing is by "automatic" conferral where an "interest in" the item seized is inherent in the "possessory" nature of the charge. In essence, the government by charging a possessory offense may not defeat standing by arguing lack of the requisite possessory interest. From that holding, one *may not* infer that "interest in" the property seized only confers standing where a "possessory" crime is charged. Such a conclusion defies logic and precedent.

It is abundantly clear that the trial court and the appellate court believed "interest in" the item seized was not a basis for conferral of standing. Rather, those courts expressed the view that one must have a sufficient legal interest in the premises, either through ownership of the premises or lawful presence *at the time of search*, or be charged with a crime, *the essential element of which is possession*. Such a construction of the law is patently narrow and erroneous.

Justice Black, dissenting over the Court's liberal application of "standing" in *Mancuse* v. *DeForte,* 392 U.S. 364 (1968), objected to what he viewed as a move away from the traditional concepts of "standing". He noted:

> . . . The Court's opinion indicates to me that the Court is preparing the way to use Jones to eliminate entirely the requirement for standing to raise a search and seizure question *and to permit a search to be challenged at any time, at any place and under all circumstances, regardless of the defendant's relationship to the person or place searched or to the things seized.* (Emphasis added).

While events have proven that Justice Black need not have been so concerned, it is abundantly clear that he felt traditional concepts of standing mandated consideration of the "defendant's relationship to the person or place searched OR *to the things seized.*" *Id.* (Black, J., dissenting at 376).

Petitioner points out that numerous decisions unequivocably establish the principle that one who claims ownership in, or of, an item of personal property seized has "standing" to challenge the search and seizure.

Referring to the law of standing prior to *Cecil Jones,* Justice Harlan of this Court stated:

> At one time, a defendant who wished to assert a Fourth Amendment objection was *required to show that he was the owner or possessor of the seized property* or that he had a possessory interest in the searched premises. (Emphasis added).

Id. at 389-390. Explaining the impact of *Cecil Jones* on that prior law, Justice Harlan noted:

> . . . we relaxed those standing requirements in two alternative ways . . . First, we held that when, as in Jones, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs.

It is clear that *Jones* in no way limited a showing of standing to the two alternatives set forth therein. Rather, those two alternatives were added to the means whereby a defendant might sustain his burden of demonstrating standing. As the Court made explicitly clear in *Simmons* v. *United States,* 390 U.S. 377 (1968):

> Under the standing rules set out in Jones, there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing. THIS CASE SERVES AN EXAMPLE. GARRETT EVIDENTLY WAS NOT IN MRS. MAHON'S HOUSE AT THE TIME HIS SUITCASE WAS SEIZED FROM HER BASEMENT. *THE ONLY, OR AT LEAST THE MOST NAT-*

> *URAL, WAY IN WHICH HE COULD BE FOUND STANDING TO OBJECT TO ADMISSION OF THE SUITCASE WAS TO TESTIFY THAT HE WAS IT'S OWNER* . . . (footnote omitted) (Emphasis added).

Id. at 390-391.

United States v. *Cobb*, 432 F.2d 716 (4th Cir. 1970) rejected the argument that standing is limited to those instances set forth in *Jones*. Therein the Court held:

> First, *Simmons* gives no support to any idea that the Court was weakening in any particular the rule in *Jones*, much less overruling it *'sub silencio'*. On the contrary . . . the Court restated and reaffirmed the rule in *Jones* so far as it applied to crimes in which possession was an essential element. Secondly, *Simmons* was not concerned with a possessory crime; that situation had already been disposed of in *Jones* by giving one charged with such crime standing without requiring as a predicate for his motion a claim of a proprietary or possessory interest in either the vehicle searched or the property seized.

Id. at 721. The Court in *Cobb* went on to state that the "dilemma" resolved in *Simmons* was that of the defendant charged with a non-possessory crime who's only means of establishing standing is to assert his ownership in the item seized. *See, United States* v. *Cobb, supra*, at 721-722. Thus, that Court clearly recognizes that standing may be conferred:

(a) automatically;

(b) based upon relationship to the situs searched, either

(1) present possessory interest, or

(2) legitimate presence on the premises when searched; and

(c) *based upon relationship to the property seized.*

See, e.g., Duncan v. *State*, 351 A.2d 144, 276 Md. 715 (1976) (folling *Cobb*); *Palmer* v. *State*, 286 A.2d 572, 577, 14 Md. App. 159 (1973).

The lower court's reliance on *Brown* v. *United States*, 411 U.S. 223 (1973), is misplaced for *Brown* does not afford any basis for excluding appellant's claim of standing. Chief Justice Burger of this Court noted that:

> Petitioners . . . alleged no propriety or possessory interest in Knuckles' premises *or in the goods seized there*, nor was any evidence of such an interest presented to the District Court. (Emphasis added)

Id. at 226.

The Chief Justice went on to discuss *Jones and Simmons* briefly noting that those two cases resolved the "dilemmas" faced by defendants in asserting standing. More specifically, Mr. Chief Justice Burger held that:

> . . . under the Simmons doctrine the defendant is permitted to establish standing by claiming 'possession' of incriminating evidence. If he is granted standing on the basis of such evidence, he may then nonetheless press for its exclusion; but whether he succeeds or fails to suppress the evidence, his testimony on that score is not directly admissible against him in the trial. Thus, *PETITIONERS IN THIS CASE WOULD HAVE ASSERTED, AT THE PRETRIAL SUPPRESS HEARING, A POSSESSORY INTEREST IN THE GOODS AT KNUCKLES' STORE WITH-*

OUT ANY DANGER OF INCRIMINATING THEMSELVES. They did not do so. (Emphasis).

Id. at 228.

If this statement does not clearly establish that standing may be conferred by a defendant's assertion of a property/possessory interest in the item seized, the following does:

> We simply see no reason to afford such 'automatic' standing (a la Jones) where, as here, there was no risk to a defendant *either* of self-incrimination *or* prosecutorial self contradiction. Petitioners were afforded a full hearing on standing and *FAILED TO ALLEGE ANY LEGITIMATE INTEREST OF ANY KIND* IN THE PREMISES SEARCHED OR *THE MERCHANDISE SEIZED.* Nor, incidentally, does the record reveal any such interest. (Emphasis added).

Id. at 229-230.

The above should be considered in light of the most recent ruling of this Court in *Rakas* v. *Illinois,* No. 77-5781 (decided December 5, 1978) wherein Mr. Justice Rehnquist in dicta acknowledged the viability of standing on the basis of interest in the property seized. The Court cited in its opinion the holdings of *Jones, supra,* and *United States* v. *Jeffers,* 342 U.S. 48 (1951) in recognizing the right to challenge a search on the basis of interest in the property seized. These holdings are clearly in conflict with the opinion of the Court of Appeals for the Fourth Circuit in the instant case.

The Appellate Court misconstrued standing so as to deprive petitioner the opportunity to challenge the instant searches, the proceeds of which furnished significant incriminatory evidence.

III. THE DECISION BELOW DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Nature of the Charge, to-wit: Transportation of Chemicals Used to Manufacture PCP in Interstate Commerce is in Fact a Possessory Crime Which Entitled Petitioner to Automatic Standing.

Petitioner was specifically convicted of travelling in interstate commerce between states with intent to further unlawful activity and thereafter transporting chemicals used to manufacture PCP. The Court of Appeals concluded that the crime charged did not include as an essential element the possession of the items seized notwithstanding the fact that possession was alleged as an element in the indictment. (See Appendix B). In addition, petitioner was charged in a state warrant with possession and manufacture of PCP in connection with the Essex County, Virginia seizure.

Reviewing the nature of the charges, it is submitted petitioner was entitled to "automatic" standing. In making that determination, the Court may not limit itself to the technical requirements of proof, but must look to the factual basis of the government's case. As the Supreme Court noted in *Cecil Jones*:

> Rule 41(e) should not be applied to allow the government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms while prosecuting for possession. (footnote omitted)

Cecil Jones v. *United States, supra,* at 264-265.

The various counts involving petitioner include conspiracy to possess, manufacture and distribute PCP.

As a part of that conspiracy Crowell was alleged to have possessed and manufactured various chemicals and drugs. In Counts II, III, IV and VI, petitioner is alleged to have "transported" chemicals used in the manufacture of Phencyclidine. It seems axiomatic that one could not transport said chemicals without "possessing" same.

Acknowledging the similarities between the instant case and *Brown* where the crimes were found to be non-possessory petitioner hastens to note the critical differences present in the instant case. Unlike the defendants in *Brown,* petitioner contends that the case against him was prepared by a state-federal prosecutorial and investigative task force. It was argued at trial that federal prosecutorial authorities selected offenses in an effort to deprive petitioner of standing to object to the searches and seizures. Consequently, petitioner argues that the Court must look beyond the federal indictment and review the underlying state charges against him. Failure to do so would give rise to a logically and legally ludicrous result. That is to say, petitioner would have standing in the state courts simply by the possessory nature of the charges lodged in Virginia, West Virginia and Maryland, yet he would have no standing to challenge the same evidence when it was turned over to the United States Attorney for federal prosecution on a "non-possessory" crime. Such a result would breathe new life into the notorious silver platter doctrine. *See, e.g., Bryars* v. *United States,* 273 U.S. 28, 33 (1924); *Wolf* v. *Colorado,* 338 U.S. 25 (1949); *Lustiz* v. *United States,* 338 U.S. 74 (1949), thus disregarding the compelling rationale of *Elkins* v. *United States,* 364 U.S. 206 (1960) which eliminated the now infamous "Silver Platter" doctrine.

Naturally, this new dilemma would not have arisen but for the Court's failure to recognize that an accused may establish his standing to exercise his Fourth Amendment right based upon an assertion of property interest in the item seized. Adoption of petitioner's position in that regard would moot this problem.

B. The Record Demonstrates a Sufficient Possessory Interest in the Premises Searched.

The Fourth Circuit Court of Appeals concluded that petitioner's allegation of possessory or proprietary interest in the premises searched depends upon his claim of agency resulting from a charged conspiracy. This finding apparently disregarded the facts accepted by the trial court that petitioner was the kingpin of a PCP manufacturing ring; that at his direction the buildings referred to in the warrants were rented for use as manufacturing sites; that petitioner visited and had access to and control over the premises and that the buildings were rented and operated by petitioner through his agent—not a partner in crime (although a co-conspirator and co-defendant), that the co-defendant/co-conspirator rented the facility and both used such facility.

The Court of Appeals disregarded the facts concluding that the person asserting standing must be a victim of the search. Citing *United States* v. *Hunt,* 505 F.2d 931 (5th Cir., 1974) the Court concluded that the agency relationship conceived by conspiracy was insufficient to establish standing. This conclusion, although viable, is contrary to the facts of the instant record.

IV. DOES PETITIONER'S SIXTH AMENDMENT RIGHT ENTITLE HIM TO AN INDIVIDUAL VOIR DIRE OF JURORS CONCERNING PER SE PREJUDICIAL PUBLICITY?

During trial petitioner requested individual voir dire of the jurors, or in the alternative, sequestration, concerning potential prejudicial publicity which had appeared in local news publications during the trial. The trial court voir dired the panel collectively with negative results. The Court of Appeals reviewed petitioner's contention concluding that under *United States* v. *Jones,* 542 F.2d 186 (4th Cir., 1976) that:

> (I)f no juror indicates, upon inquiry made to the jury collectively that he has read or heard of the publicity in question, the judge is not required to proceed forth.

Petitioner contends that notwithstanding such ruling in light of the record in the instant case that individual voir dire to insure an impartial jury is petitioner's constitutional right. Individual voir dire is the only method to determine taint.

V. PETITIONER WAS ENTITLED AS A MATTER OF RIGHT TO AN EVIDENTIARY HEARING REGARDING ELECTRONIC SURVEILLANCE.

The trial record conclusively established that government counsel was misinformed concerning the nature and extent of electronic surveillance until confronted by the representations of defense counsel. Notwithstanding the established fact that surveillance techniques were utilized extensively, the trial court ruled that the unsworn representation of government counsel was adequate to eliminate the need for such a hearing.

The Court of Appeals adopted this ruling without authorities, again accepting the representation of government counsel notwithstanding the previous inconsistent representations of government counsel contained in the record.

CONCLUSION

For the above reasons certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2323

United States of America, *Appellee,*

v.

Alfred David Crowell, *Appellant.*

No. 76-2324

United States of America, *Appellee,*

v.

Donal Jarrett Gillespie, *Appellant.*

No. 76-2325

United States of America, *Appellee,*

v.

Michael Marion Robertson, *Appellant.*

No. 77-1504

United States of America, *Appellee,*

v.

Michael Marion Robertson, *Appellant.*

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Argued September 11, 1978 Decided November 17, 1978

Before HAYNSWORTH, *Chief Judge*, WINTER and PHILLIPS, *Circuit Judges*.

Lee Gordon (Karl H. Goodman, Gordon & Goodman on brief) for Appellants in 76-2325 and 77-1504; David B. Lamb (Patrick J. Moran, Lamb, Halleck & Keats on brief) for Appellant in 76-2323; Gary E. Klein (Kenneth E. Conklin on brief) for Appellant in 76-2324; Robert B. Schulman, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

WINTER, *Circuit Judge:*

Defendants, Alfred David Crowell, Donal Jarrett Gillespie and Michael Marion Robertson, were convicted by a jury of conspiracy to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense the controlled substance phencyclidine (PCP), in violation of 26 U.S.C. §§ 846 and 841(a)(1). Crowell was also convicted of four separate charges of traveling in interstate commerce in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952(a)(3).[1]

Each has appealed and collectively they assign ten errors committed during their trials and in rulings on pretrial motions which they assert require reversal of their convictions. All claim error in the district court's alleged failure

[1] The conspiracy count of the indictment was also returned against six other co-conspirators and named nineteen other unindicted co-conspirators as well as "others known and unknown to the Grand Jury. . . ." In three of the four travel counts, other co-defendants were indicted with Crowell.

to interrogate the non-sequestered jury about its exposure to prejudicial publicity. Crowell claims error in the district court's denial of his motion to suppress the fruits of the warrantless search of his trash can, the search of his truck as authorized by a warrant, and the search of his residence, again conducted under warrant. He also asserts that the district court improperly denied him standing to challenge the validity of the search of four separate premises and improperly denied him a hearing on his claim of illegal electronic surveillance, and that the district judge erroneously refused to disqualify himself upon Crowell's affidavit of bias and prejudice. Robertson asserts that the indictment against him should be dismissed in accordance with a government promise of immunity. Gillespie contends that the Jencks Act was violated when the statement of a witness was not furnished him because it had improperly been destroyed. He also contends that the testimony of a Drug Enforcement Agent should have been stricken because the agent failed to keep his notes concerning the matter about which he testified and that it was error for the district court to deny his pretrial motion for severance. Finally, he asserts that the evidence was legally insufficient to convict him.

We see no reversible error in the numerous contentions that are advanced and we affirm.

I.

The government's evidence consisted chiefly of the observations of agents who had conducted surveillance of various defendants and the fruits of several searches of places where PCP was manufactured and stored. There was also testimony from persons who participated in the operation of the conspiracy.

In support of the conspiracy count of the indictment, the government's evidence showed the existence of a scheme to manufacture an enormously profitable controlled danger-

ous substance, phencyclidine (PCP). Initially the manufacturing operation was conducted at Crowell's home in Montgomery County, Maryland, where Crowell and Robertson spent hours refining the necessary chemical ingredients according to a process taught by records which they obtained from the United States Patent Office. As the enterprise flourished, Gillespie and others were added to the fold—Gillespie to aid in distribution of the product and others to assist in its manufacture. Clandestine laboratories were established in two counties of Virginia and quantities of apparatus and chemicals were purchased in the District of Columbia, Maryland, Virginia, New York and Colorado, and transported to the laboratories.

Law enforcement officers first discovered the illegal enterprise in 1975 as a result of observations of Crowell's residence and detection of the chemical odors emanating therefrom. Materials were seized from Crowell's trash and analyzed. They were found to contain PCP. A search warrant for the premises was executed and various chemicals, apparatus and an enormous quantity of PCP were seized.

After the 1975 raid, the Crowell laboratory was moved to the home of a non-appealing co-defendant and plans were made to move it elsewhere. Gillespie and another purchased a farm in West Virginia as a site but that location was never used for manufacture. A second search warrant for Crowell's residence was executed in 1976 and chemicals, money and a small quantity of PCP were seized. The laboratory was then moved to Tappahannock, Virginia and the execution of a search warrant on it uncovered a cache of chemicals and apparatus capable of being used to manufacture PCP worth millions of dollars.

Other facts will be stated later in the opinion in connection with the contentions to which they relate.

II.

Voir Dire of Jury

The trial of defendants' case generated a great deal of newspaper publicity both before the trial began and during its course. In the selection of the jury, at least one member of the venire was excused because he said that he had read about the case that morning. Once the jury was selected, the district court admonished it to refrain from reading articles or listening to broadcasts concerning the trial. The jury was not sequestered, but this admonition was repeated periodically throughout the trial.

On the second day of trial, defense counsel presented to the court two newspaper articles that reported on the opening of the proceedings. Both stressed that courtroom security was unusually restrictive in response to unspecified threats. The articles named the defendants and identified the charges against them. Immediately after learning about the articles, the district judge inquired of the jurors whether they had been exposed to any publicity concerning the case. When there was no response, he repeated the admonition against reading articles or listening to broadcasts about the trial and proceeded with the case.

On the fourth day of trial, a newspaper published an edition bearing the banner headline, "DEATH THREAT TIP CAUSES FEDS TO TIGHTEN DRUG TRIAL SECURITY—Gang May Attempt to Kill Defendant." The body of the article contained highly prejudicial information. Defense counsel called this article to the attention of the district court and moved for a mistrial. Again the district court interrogated the jury collectively as to whether anyone had read the article and when no juror responded affirmatively, the district court denied the motion and proceeded with the trial.

We see no error in the manner in which the district court proceeded or in its ruling. Our decisions in United States

v. Pomponio, 517 F.2d 460 (4 Cir.), *cert. denied,* 423 U.S. 1015 (1975); and United States v. Hankish, 502 F.2d 71 (4 Cir. 1974), prescribed the manner in which a district court should proceed to determine whether a jury's impartiality has been adversely affected by prejudicial publicity. First, the obligation of bringing prejudicial material to the attention of the district judge rests with defense counsel. Once the material is before the judge, he must determine whether it is prejudicial. That entails a determination of whether the publicity disclosed information about the defendant that would not be admissible before the jury, or that was not in fact adduced before the jury in open court. United States v. Jones, 542 F.2d 186, 195 (4 Cir. 1976). If the material is found to have been prejudicial, the judge must then ascertain whether any of the jurors were exposed to it. "[I]f no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further." United States v. Hankish, 502 F.2d at 77. (Quoting from Margoles v. United States, 407 F.2d 727, 735 (7 Cir.), *cert. denied,* 396 U.S. 833 (1969)). If, on the other hand, some members have been exposed to the prejudicial material, the district court must then determine the extent and effect of the infection and act to ensure a fair trial. United States v. Hankish, *supra;* United States v. Pomponio, 517 F.2d at 463.

In the instant case, it is manifest that the district court proceeded correctly. Since upon collective inquiry no juror indicated that he had read the publicity in question, there was no need for voir dire on an individual basis.

III.

Search of Trash

On two occasions in late March or early April, 1975, Montgomery County police officers, lacking a warrant, nonetheless directed Crowell's private contract trash collector

to turn over trash which had been collected from Crowell's residence. On each occasion the trash collector had collected the bag of trash and carried it off of the Crowell property preparatory to putting it on the collection truck. On each occasion the trash collector did as he was told and the police officers received the bag. The trash collector had no permission from Crowell to turn over the trash to the police. At the same time, there was no evidence that he had any instructions other than to remove and dispose of it.

The police examined the trash and caused certain substances contained in it to be subjected to chemical analysis. They were shown to be PCP. The presence of PCP in the trash was later used by the police as one of the grounds for obtaining a search warrant to search Crowell's home. It is not shown that evidence of the presence of PCP in the trash was used to convict Crowell an dhis co-defendants; but even if we assume that they may attack the validity of the warrant because the affidavit supporting its issuance contained an allegation of fact allegedly obtained in violation of the fourth amendment, we see no merit in the contention that the fourth amendment was transgressed.

The validity of garbage searches has been the subject of numerous opinions by various courts. While most people probably expect that their garbage will not be inspected but rather will be taken directly to the dump, it is equally true that most people have no clear understanding of what happens to their garbage when it is removed from their premises and have even less expectation of having anything further to do with it once it is removed. The real question is whether there is a reasonable expectation of privacy that one's garbage will not be searched.

On this issue, the authorities are split. Stemming from People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 712 (1969),

a number of state courts and a federal district court[2] have held that a person discarding trash has a reasonable expectation that his trash will not be rummaged through and picked over by police without a search warrant, and therefore that a warrantless search of one's trash is in violation of the fourth amendment. But we think that the better view is that expressed by every United States Court of Appeals that has had reason to address the issue as exemplified in United States v. Shelby, 573 F.2d 971 (7 Cir. 1978); Magda v. Benson, 536 F.2d 111 (6 Cir. 1972); and United States v. Mustone, 469 F.2d 970 (1 Cir. 1972). *See also* United States v. Minker, 312 F.2d 632 (3 Cir. 1962), *cert. denied*, 372 U.S. 953 (1963); United States v. Dzialak, 441 F.2d 212 (2 Cir.), *cert. denied*, 404 U.S. 883 (1971). In accord with those cases, our view is that, absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection. The act of placing it for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment. Certainly there was no fourth amendment protection in the instant case where there was no evidence that Crowell had made any special arrangement for the disposition of his trash and where the garbage had been actually removed from Crowell's premises before it was commandeered by the police.

[2] *See, e.g.*, People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262 (1971), *vacated*, 409 U.S. 33 (1972); *reaffirmed*, 8 Cal. 3d 504 P.2d 457, 623 (1973); Ball v. State, 57 Wisc. 2d 653, 205 N.W.2d 353 (1973); State v. Chapman, 250 A.2d 203 (Me. 1969); United States v. Kahn, 350 F.S. 784 (S.D. N.Y. 1972), *aff'd in part and rev'd in part*, 479 F.2d 290 (2 Cir. 1973), *rev'd*, 415 U.S. 239 (1974).

IV.

Crowell's Other Search Contentions

We think that the Maryland warrant for the search of Crowell's U-haul truck on January 16, 1976 was valid because the affidavit on which it was issued established probable cause to believe that a crime had been committed under Maryland law. In the course of this search, it was proper to seize non-controlled chemicals which could be used for the manufacture of PCP. Similarly, we think that the affidavit for the search of his residence on April 3, 1975 established probable cause justifying the issuance of a warrant. The affidavit was not rendered deficient by proof that the affidavit erroneously stated that PCP found in the trash was in the form of white crystalline material rather than, as was the fact, in the form of brown flakes. The variance appears innocent and a result of simple carelessness; it does not demonstrate perjury on the part of the affiant or reckless disregard of the true facts. Franks v. Delaware, —— U.S. —— (1978); United States v. Lee, 540 F.2d 1205, 1209 (4 Cir.), *cert. denied*, 429 U.S. 894 (1976). Thus, we reject the attacks on the validity of both warrants.

Crowell's attacks on the validity of four searches, i.e. search of a residence in Spotsylvania County, Virginia in April 1975, search of a farmhouse in Greenbrier, West Virginia on October 22, 1975, search of the residence of Milton Warren in Wheaton, Maryland in December 1975, and search of an outbuilding in Essex County, Virginia on April 1, 1976, were rejected by the district court on the ground that Crowell lacked standing to contest their validity. We think that the district court ruled correctly.

Before us, Crowell contends that he had standing both because he had a possessory interest in the items seized, and because he had a possessory interest in the premises searched. Were Crowell charged with a crime an essential element of which is possession of the items seized, he

would have standing to contest the validity of the searches. Brown v. United States, 411 U.S. 223, 229 (1973). But Crowell was not charged with such a crime; he was charged with (a) conspiracy which is not a possessory crime, even where the conspiracy is one to manufacture and possess a controlled substance, United States v. Hutchinson, 488 F.2d 484, 492 (8 Cir. 1973), *cert. denied*, 417 U.S. 915 (1974), and (b) traveling in interstate commerce in aid of a racketeering enterprise which again involves no element of possession. Absent accusation of a crime an essential element of which is possession of the items seized as a result of a search, we have held that an allegation of a possessory interest in the items seized, standing alone, does not confer standing to object to a search. United States v. Jackson, —— F.2d —— (Nos. 77-2530/31, October —, 1978).

Crowell's assertion of a possessory interest in the premises searched, if sustained by the proof, would confer standing on him. Brown v. United States, *supra*. His motion to suppress, however, alleged no direct proprietary or possessory interest in any of the four premises; the proof showed that they were owned or rented by others; and he was not present on any of the four premises when the searches were conducted. Crowell's assertion of a possessory or proprietary interest in the premises searched depends upon his claim that the other evidence showed that he was the kingpin in the overall conspiracy and, since the various premises were rented or used to further the conspiracy, under the law of agency, the acts of Crowell's co-conspirators in acquiring leases and proprietary interests became his acts so as to give him standing.

In United States v. Hunt, 505 F.2d 931 (5 Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), the identical argument was rejected, and we are persuaded of the correctness of that decision. In *Hunt*, Judge Goldberg made a thorough and scholarly analysis of recent Supreme Court decisions

relating to standing to assert a violation of the fourth amendment, concluding that the key to standing is whether the person asserting it was a "victim" of the search, "the 'one against whom the search or seizure was directed.' " 505 F.2d at 938. He stressed the correlation between the scope of the amendment's protection and the concept of privacy. Then he added:

> One of the most significant aspects of the law of standing in search and seizure cases, and one that clearly reflects the intensely personal nature of Fourth Amendment rights, is the rule that inter-personal relationships cannot make a "victim" of one who is not otherwise "one against whom the search or seizure is directed." . . . Alderman v. United States [394 U.S. 165 (1969)] dictates that co-defendants and co-conspirators may not assert the Fourth Amendment rights of their alleged partners in crime solely on the basis of their interpersonal association, because Fourth Amendment rights are personal ones. 505 F.2d at 939.

More specifically, Judge Goldberg rejected the argument that defendants had standing to object to a search because the parties searched were their agents:

> Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* [Alderman v. United States, 394 U.S. 165 (1969)] and *Brown* [Brown v. United States, 411 U.S. 223 (1973)] forbid. If we were to adopt the position urged by defendants, any criminally-inclined individual could earn a double dividend by hiring private investigators to complete his schemes: not only could the principal disassociate himself from any physical unpleasantness or risk involved in the

criminal activity and at the same time cover his own tracks, but he could claim a privacy interest in any instrumentalities of the crime, no matter whether he had the slightest idea of the existence of such instrumentalities before the unpleasant epiphany of arrest. 505 F.2d at 942.

To like effect is United States v. Potter, 419 F.S. 1151, 1154-56 (N.D. Ill., 1976), *aff'd*, 567 F.2d 392 (7 Cir. 1977).

Thus we conclude that, without proof that Crowell selected the various premises and directed that they be acquired by purchase or lease in his name or in the name of a nominee, he did not acquire a sufficient right of privacy therein to give him standing to object to their search.[3]

V.

Denial of Hearing on Electronic Surveillance; The District Judge's Refusal to Disqualify Himself

Crowell contends that he was improperly denied a hearing under 18 U.S.C. § 3504(a)(1) with respect to his claim that some of the government's evidence was derived from the use of illegal electronic surveillance. We think that no hearing was required.

In fact, a bumper beeper was installed on Crowell's airplane pursuant to a court order and another was installed without a court order on a car belonging to a co-defendant's wife. The function of the bumper beepers was to serve as a beacon device which would permit detection of the location of the vehicles to which they were attached. But as

[3] We do not foreclose the possibility that one may acquire a right of privacy in premises through the acts of his agent. What we decide here is that the proof was insufficient to conclude that the right of privacy, and hence standing to complain of an allegedly illegal search, was created.

an Assistant United States Attorney reported to the district court, the bumper beeper attached to the automobile failed to function and that attached to the airplane was discovered by Crowell and rendered inoperative so that it, too, failed to function. As a result, there was no effective surveillance of either vehicle and no logs of where they had traveled.

While it is true that § 3504(a)(1) provides that, upon the claim of one who is aggrieved by admission of evidence obtained by an unlawful act, his opponent "shall affirm or deny the occurrence of the alleged unlawful act," we think that the burden was met by the representations of the government's counsel.

The claim that the district judge improperly refused to rescue himself, in accordance with 28 U.S.C. § 144, is frivolous. Crowell's affidavit of bias and prejudice alleged that (a) in ruling on certain pretrial motions, the district judge ruled, referring to typewritten pages before him without taking a recess, indicating that he prejudged the case, and (b) on one occasion the district judge said that he would deny certain motions but would give Crowell a hearing anyway.

These allegations do not establish bias or prejudice stemming "from an extrajudicial source and result[ing] in an opinion on the merits on some basis other than what the judge learned from his participation in the case. . . ." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). The motions presented legal issues largely determinable from papers before the district judge. The fact that the district judge had researched the problems in advance and was able to make an immediate ruling does not establish prejudgment.

VI.

Robertson's Claim of Immunity

During the course of the investigation of the case before an indictment was returned, the government agreed with Robertson, who was represented by counsel, that in return for his "complete and total cooperation" with the law enforcement personnel investigating the case, he would not be prosecuted for any information that he supplied. Following the agreement, Robertson submitted to one interview at the United States Attorney's office during which he denied any participation in the conspiracy or any knowledge of Crowell's involvement in the manufacture of PCP. When Robertson failed to appear at a second scheduled interview and declined to appear at a third or any future scheduled interview, the government gave Robertson's attorney written notice that it was withdrawing its agreement for failure on the part of Robertson to cooperate.

In due course, Robertson was indicted and he moved to dismiss the indictment on the ground that it violated the agreement. The district court ruled that Robertson had failed to perform the condition precedent to the promised grant of immunity by his failure to cooperate. The record clearly reflects that Robertson did not tell what he knew. Denial of the motion was therefore proper. United States v. Simmons, 537 F.2d 1260 (4 Cir. 1976).

VII.

Gillespie's Claim of Violation of the Jencks Act

Catherine Foster testified as a government witness and part of her testimony implicated Gillespie. Prior to trial, the government had voluntarily disclosed copies of all statements made by government witnesses and copies of all reports of interviews of government witnesses, including copies of an unsigned pretrial statement by Catherine Foster.

During the course of cross-examination, Foster revealed that she had examined the notes prepared by Drug Enforcement Agent Grimes before they were typed in final form and had said that they were correct, but she had not read beyond the first two paragraphs of the document which the government had furnished to Gillespie's counsel. Gillespie's counsel immediately moved for production of the agent's notes. The motion was denied, and it was later shown that the notes could not have been produced since they had been destroyed.

The government concedes that the interview notes were Jencks material and that their destruction was error. It insists, however, that the error was harmless, and we agree.

A violation of the Jencks Act should be excused only where it is perfectly clear that the defense was not prejudiced. United States v. Snow, 537 F.2d 1166, 1168 (4 Cir. 1976). We think the lack of prejudice was established. Foster was a cumulative witness whose testimony against Gillespie was fully corroborated. While this alone does not demonstrate lack of prejudice, the record also indicates that the statement furnished counsel substantially incorporated the interview notes. Indeed, defense counsel did not ask Foster if the statement that was furnished was inaccurate with regard to the information she gave the agent. Nor did defense counsel interrogate Grimes about the accuracy of the statement he prepared. By receiving a copy of the statement, counsel obtained in substance all that the notes would have disclosed.

More significantly, however, Foster's credibility was thoroughly impeached so that any additional attack would have been to little purpose. Foster admitted that she regularly used PCP; she also stated that she sometimes had trouble remembering things; and both parties are agreed that her testimony was confused, inconsistent and strained.

VIII.

Gillespie's Contentions Regarding the Drug Enforcement Agent's Testimony

On October 14 and November 21, 1975, Drug Enforcement Agent Grimes eavesdropped from an adjoining motel room on three conversations participated in by Gillespie. Grimes took notes of what he heard, but intervening noise frequently interfered with his efforts. He incorporated the contents of these notes, except with regard to personal matters discussed by those engaging in the conversation which Grimes thought irrelevant to the investigation, into his report. After the report was prepared, the original notes were destroyed.

The agent's report was furnished to defense counsel before trial, but after Grimes had testified about the conversations he overheard and it was learned that his original notes had been destroyed, Gillespie's counsel moved to strike the agent's testimony on the ground that the government had violated F. R. Crim. P. 16(a) and the holding of Brady v. Maryland, 373 U.S. 83 (1963), by not furnishing or producing the original notes.

We see no error in the district court's refusal to strike Grimes' testimony. The requirement of Rule 16 is that the government produce for discovery any "relevant" written or recorded statements, etc. Grimes testified that his report incorporated the entire contents of his notes except for those portions which did not relate to the investigation. That being so, the report furnished counsel supplied all *relevant* statements in the possession of the government.

Similarly, the destruction of the notes did not amount to a violation of the *Brady* doctrine. *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

373 U.S. at 87. The circuits are split on whether an agent's rough notes constitute *Brady* material where their only exculpatory value lies in their use to impeach the agent's testimony. *Compare* United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975) (notes held producible), *with* United States v. Martin, 565 F.2d 362 (5 Cir. 1978) (notes not *Brady* material).

We hold that *Brady* does not apply in such cases in the absence of some demonstration that the material sought would be exculpatory, even if that burden is relaxed because the document has been destroyed. If there were any real issue as to Grimes' credibility, presumably Gillespie, who was a party to the conversations that were overheard and who had ample time to examine the report with his counsel, would have known whether the agent's report was accurate and hence the defense would have had the ability to determine the impeachment potential of the notes. Here, all that we have is the unsupported speculation that there *may* have been some variance between the notes and the report into which they were incorporated. We do not think that this is enough to establish a violation of *Brady*.

IX.

Gillespie's Other Contentions

Gillespie's arguments that the district court should have granted a severance and that there was not legally sufficient evidence to sustain a verdict against him have been considered by us and we find them lacking in merit. We do not think that they warrant further discussion.

AFFIRMED.

APPENDIX B

Count Two

And the Grand Jury for the District of Maryland further charges:

On or about August 7, 1975, in the State and District of Maryland,

Alfred David Crowell
and
Byron Earl Fountaine

travelled in interstate commerce from the State and District of New York to Baltimore, in the State and District of Maryland, with the intent to further unlawful activity in violation of Title 21, United States Code, Sections 846 and 841(a)(1), and thereafter the said defendants, Alfred David Crowell and Byron Earl Fountaine did transport chemicals used in the manufacture of a Schedule III, Non-Narcotic Drug Controlled Substance, to wit: Phencyclidine.

18 U.S.C. § 1952

Count Three

And the Grand Jury for the District of Maryland further charges:

On or about the 13th day of August, 1975, in the State and District of Maryland,

Alfred David Crowell

travelled in interstate commerce from the State and District of New York to the State and District of Maryland with the intent to further unlawful activity in violation of Title 21, United States Code, Sections 846 and 841(a)(1), and thereafter the said defendant, Alfred David Crowell did transport chemicals used in the manufacture of a Schedule III, Non-Narcotic Drug Controlled Substance, to wit: Phencyclidine.

18 U.S.C. § 1952

Count Four

And the Grand Jury for the District of Maryland further charges:

From on or about March 1975 to on or about April 1975, in the State and District of Maryland,

Alfred David Crowell
and
Andrew "Andy" Narel

travelled in interstate commerce from the State and District of Maryland to Spottsylvania County, Virginia, with the intent to further unlawful activity, in violation of Title 21, United States Code, Sections 846 and 841(a)(1), and thereafter the said defendants, Alfred David Crowell and Andrew "Andy" Narel did transport chemicals used in the manufacture of a Schedule III, Non-Narcotic Drug Controlled Substance, to wit: Phencyclidine.

18 U.S.C. § 1952

Count Six

And the Grand Jury for the District of Maryland further charges:

From on or about the 15th day of January, 1976, to the 16th day of January, 1976, in the State and District of Maryland,

Alfred David Crowell
and
Byron Earl Fountaine

did travel, and cause to travel, in interstate commerce from the State and District of New York to the State and District of Maryland, with the intent to further unlawful activity in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and thereafter said defendants, Alfred David

CROWELL and BYRON EARL FOUNTAINE, did transport chemicals used in the manufacture of a Schedule III, Non-Narcotic Drug Controlled Substance, to wit: Phencyclidine. 18 U.S.C. § 1952

No. 78-1022

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED DAVID CROWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 586 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1978. The petition for a writ of certiorari was filed on December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized from petitioner's trash after the trash collector had removed it from petitioner's property should have been suppressed at trial.

2. Whether the government infringed petitioner's privacy interests under the Fourth Amendment when it searched premises neither owned nor leased by petitioner.

3. Whether petitioner had a right to individual voir dire of the jury concerning trial publicity.

4. Whether petitioner was entitled to a hearing to determine whether, contrary to the government's assertions, "beepers" attached to petitioner's airplane and to a car belonging to another for the purpose of monitoring their movements actually functioned as intended and produced evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiracy to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense phencyclidine (PCP), a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846, and on four counts of traveling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3) (Pet. App. 2a).[1] He was sentenced to terms of incarceration totaling 15 years, a five-year special parole term, and a fine of $10,000. The court of appeals affirmed (Pet. App. 1a-17a).

The evidence at trial consisted primarily of the observations of agents who had conducted surveillance, the fruits of several searches, and testimony of people involved in the conspiracy. It proved a scheme to manufacture PCP, initially at petitioner's home, where he and a co-defendant refined a process they derived largely

[1]Two co-defendants were also convicted by the jury, other co-defendants pleaded guilty, and one co-defendant's motion for judgment of acquittal was granted at the close of the government's case.

from United States Patent Office records (Tr. 13-14, 23-24). As the enterprise grew in number of persons involved and in volume of PCP produced, remote secret laboratories were established and chemicals were brought in from various States (Tr. 104-105, 109-110).

1. PCP seized from a search of trash obtained from petitioner's residence in Montgomery County, Maryland, was admitted into evidence at trial. On April 3, 1975, an employee of a private trash disposal company went on petitioner's premises to collect the trash (P.H. Tr. 22).[2] Upon leaving the premises, the collector was approached by two police officers who were standing on the street (P.H. Tr. 22, 25). On request, the collector turned the bag over to them (*ibid.*). A few days later, the collector was once again approached in the street by an officer and again turned over a bag of petitioner's trash (P.H. Tr. 26).

2. Premises in Virginia, West Virginia, and Maryland, were searched pursuant to several warrants; these searches resulted in the seizure of chemicals and apparatus used by the conspirators in manufacturing PCP (Pet. App. 9a). Petitioner did not own or lease any of the premises, nor was he present when they were searched (Pet. App. 10a). He nevertheless moved to suppress the seized evidence, arguing that he must have had a possessory interest in the premises used to manufacture PCP and store chemicals. He supported this contention with argument by counsel concerning what the government could be expected to seek to prove at trial. He did not testify or present any other witnesses (J.A. 242-276).[3] Petitioner also claimed that he had a possessory interest in the items seized and that he had "automatic standing to

[2]"P.H. Tr." refers to the transcript of a pretrial hearing conducted on August 9, 1976.

[3]"J.A." refers to the joint appendix filed in the court of appeals.

challenge the searches." The district court ruled that petitioner did not have standing to contest the searches and seizures and characterized petitioner's possessory or proprietary interest in the premises as "speculative at best" (J.A. 276).

3. Before trial, petitioner moved for a continuance, severance, and change of venue because of an article in a Baltimore newspaper (V. Tr. 3-7; J.A. 140-141).[4] The trial judge denied the motions, indicating that voir dire would suffice to determine whether the prospective jurors had been prejudicially infected by the publicity (V. Tr. 12-14). During voir dire, the trial judge questioned the veniremen about publicity, struck for cause one who had read the newspaper piece, and admonished the group not to read or listen to anything concerning the case (V. Tr. 17-29). After the initial voir dire, the trial judge discussed the subject at the bench with counsel, and no one raised any objections to any of the questions regarding publicity (V. Tr. 29-32). When counsel requested the judge to again question the veniremen about exposure to publicity, he promptly did so (V. Tr. 32).

After the petit jury was selected and sworn, the judge admonished its members at length not to read about or discuss the case with anyone (V. Tr. 43-46). At the lunch break, at the close of the first day of trial, and on a number of occasions during the trial the judge instructed the jurors to consider only the evidence at trial and to report immediately any exposure to other information concerning the case (see, *e.g.*, V. Tr. 47; Tr. 90, 285-286, 503-504, 673, 745-746). During trial, petitioner's counsel twice brought to the district judge's attention the appearance of articles in Baltimore newspapers, and the second time he requested a mistrial. On each occasion, the judge inquired

[4] "V. Tr." refers to the transcript of the voir dire of the jury panel.

of the jury collectively concerning whether they had been exposed to publicity, and no jury member responded (Tr. 97-98, 513; J.A. 7-12). After receiving no juror response to his inquiry on the second occasion, the district judge denied the motion for a mistrial (J.A. 12).

4. During the investigation of this case, a beeper was installed on petitioner's airplane pursuant to affidavit and court order, and another beeper was installed without a court order on a car belonging to a co-defendant's wife (Pet. App. 12a). After petitioner's counsel was furnished the affidavit and court order during pretrial discovery, he moved for a hearing and for suppression of the results of all surveillance utilizing the beepers. During a motions hearing, an Assistant United States Attorney represented to the court that "no evidence [was] derived from the utilization of [the] bumper beepers" because contact was lost with both the plane and the car after the beepers were installed (J.A. 37). Thus no surveillance was conducted and no evidence was gathered. The prosecutor also stated that there was no electronic surveillance other than the bumper beepers (J.A. 35-38). Based on these representations, the court denied the request for a hearing. It did, however, allow petitioner's counsel to question the case agent in the prosecutor's presence about the beeper (J.A. 41), but counsel never availed himself of this opportunity.

5. In affirming petitioner's conviction, the court of appeals specifically addressed all of his contentions respecting the searches (Pet. App. 6a-12a) and his contentions respecting prejudicial publicity (Pet. App. 5a-6a) and the installation of bumper beepers (Pet. App. 12a-13a). In deciding the search issues, the court of appeals, *inter alia*, agreed with the district court that petitioner lacked standing to contest searches of a farmhouse in Spotsylvania County, Virginia, and of a shed on a farm in Essex County, Virginia, near Tappahannock (Pet. App. 9a). It held that standing could not be predicated on

ownership of the articles seized unless possession of those articles was an element of the crime charged, and it noted that possession was not an element of the crimes charged here (Pet. App. 9a-10a). The court acknowledged that petitioner's "assertion of a possessory interest in the premises searched, if sustained by the proof, would confer standing on him" (Pet. App. 10a), but it concluded that petitioner had not made the necessary showing in support of his motion to suppress (Pet. App. 10a-12a).

ARGUMENT

1. Petitioner's claim that the district court should have suppressed evidence seized during the search of his trash is without merit. Petitioner had placed his trash outside his house for collection by a private trash disposal company. After it had been collected and removed from petitioner's property, the police obtained possession of it from the collector. Although the collector did not have petitioner's permission to give the trash to the police, no evidence was presented that he was instructed to dispose of the trash in any particular manner. Petitioner thus had no legitimate expectation of privacy in his trash. See *Rakas* v. *Illinois*, No. 77-5781, decided December 5, 1978; *Katz* v. *United States*, 389 U.S. 347, 353 (1967). That a person has a "legitimate" expectation of privacy entails more than a subjective expectation that his trash will not be disturbed. See *Rakas* v. *Illinois*, *supra*, slip op. 15 n.12. Both courts below (Pet. App. 8a) properly found that at the time the private collector had removed the trash from petitioner's premises petitioner had abandoned the items in his trash can and no longer had an interest in them.[5] See *Abel* v. *United States*, 362 U.S. 217, 241 (1960);

[5]A district court's finding of abandonment is based on factual findings regarding action and intent and should not be overturned unless clearly erroneous. *United States* v. *Alden*, 576 F. 2d 772, 777 (8th Cir. 1978); *Magda* v. *Benson*, 536 F. 2d 111, 112 (6th Cir. 1976).

United States v. *Alden*, 576 F. 2d 772, 777 (8th Cir. 1978); *United States* v. *Shelby*, 573 F. 2d 971, 973-974 (7th Cir. 1978); *Magda* v. *Benson*, 536 F. 2d 111 (6th Cir. 1976); *United States* v. *Mustone*, 469 F. 2d 970, 972-973 (1st Cir. 1972); *United States* v. *Dzialak*, 441 F. 2d 212, 215 (2d Cir.), cert. denied, 404 U.S. 883 (1971); *United States* v. *Minker*, 312 F. 2d 632, 634-635 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963). See also *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Basile*, 569 F. 2d 1053, 1056 (9th Cir.), cert. denied, 436 U.S. 920 (1978).[6]

2. Regarding the other searches, petitioner challenges in this Court only the searches of premises in Spotsylvania County, Virginia, and Essex County, Virginia (Pet. 10-19). He bases his contention that he had standing to challenge these searches on (1) his assertion of an interest in items seized (chemicals and apparatus used in the manufacture of PCP) (Pet. 10-16), (2) "automatic" standing, which he alleges was conferred by the nature of the federal charges and by pending state charges of illegal possession (Pet. 17-19), and (3) a possessory interest in the premises searched (Pet. 19). The court of appeals correctly held that these claims either were inadequate on their face to establish standing or were not supported by sufficient proof for that purpose. In the terms employed by this Court in *Rakas* v. *Illinois*, *supra*, slip op. 5, petitioner failed to show an infringement of his personal Fourth Amendment rights.

[6]The only federal case petitioner cites on his behalf is *United States* v. *Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), aff'd in part and rev'd in part, 479 F. 2d 290 (2d Cir. 1973), rev'd, 415 U.S. 239 (1974), in which abandonment was considered only at the district court level. In any event, that case is inapposite because it involved a search of a wastepaper basket within a private office, performed before the contents of the basket had been removed from the office.

a. The Fourth Amendment confers the right to be protected against both unreasonable searches and unreasonable seizures. The proper test for determining whether a defendant's rights have been infringed by an unreasonable search is whether he had "a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois, supra,* slip op. 15, citing *Katz* v. *United States,* 389 U.S. 347 (1967). A defendant without such an expectation of privacy in the place searched suffers no infringement of his Fourth Amendment rights from the "invasion" inherent in that search and therefore cannot challenge the validity of the search, even though it results in the disclosure or seizure of evidence that may be used against him at a criminal trial.

If property belonging to a defendant is seized from an area in which he has no legitimate personal expectation of privacy, a distinction must be drawn between his "standing" to challenge the search and his right to challenge the lawfulness of the seizure of his property. He may be heard only with respect to claims based upon alleged illegality of the seizure itself, not with respect to claims attacking the means by which his property came into the plain view of the searching officers. See *United States* v. *Lisk*, 522 F. 2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).[7]

Petitioner has not claimed that the seizure of items—mainly PCP and instruments and compounds used in its manufacture—from the Spotsylvania farmhouse or the Essex County shed were vulnerable to challenge for any reason apart from his challenge to the right of officers to

[7]This is not a meaningless right. As in the case of any articles seized under the plain view doctrine, such seizures must be based on probable cause. Moreover, seizure of articles contained in a locked suitcase or similar container could be challenged by their owner if the container were opened without a separate warrant. See *United States* v. *Chadwick,* 433 U.S. 1 (1977).

search the premises; and since, as we show below, he failed to prove that he had a legitimate expectation of privacy in the premises, he clearly has shown no infringement of his own Fourth Amendment rights.

b. Petitioner's claim of "automatic standing" fails to support his challenge to the search for the same reason that his claim of possession of the items seized fails, even if we assume that the automatic standing rule of *Jones* v. *United States*, 362 U.S. 257 (1960), survives this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968) (see *Rakas* v. *Illinois*, *supra*, slip op. 7 n.4).[8] Moreover, petitioner lacks automatic standing under *Jones* because he was not charged with a possessory offense. *Brown* v. *United States*, 411 U.S. 223, 229 (1973).[9] Petitioner was charged first with conspiracy which, as the court of appeals noted (Pet. App. 10a), "is not a possessory crime, even where the conspiracy is one to manufacture and posses a controlled substance." See *United States* v. *Riquelmy*, 572 F. 2d 947, 951 (2d Cir. 1978); *United States* v. *Prueitt*, 540 F. 2d 995, 1004 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977), *United States* v. *Hutchinson*, 488 F. 2d 484, 492 (8th Cir. 1973), cert. denied, 417 U.S. 915 (1974). He was also charged with traveling in interstate commerce in aid of a racketeering enterprise, but, again, that kind of offense does not require possession. See *United States* v. *Prince,* 529 F. 2d 1108, 1111-1112 (6th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir), cert.

[8]We disagree with the view expressed by the court of appeals (Pet. App. 9a-10a) that standing to challenge the *search* could be predicated on ownership of the items if a possessory offense were charged.

[9]The mere fact that petitioner may have "automatic standing" in a state court to contest the search in Virginia, where he is charged with a possessory offense, does not confer standing on him in federal court. See *Elkins* v. *United States*, 364 U.S. 206, 224 (1960).

denied, 423 U.S. 874 (1975); *United States* v. *Gibson Specialty Co.*, 507 F. 2d 446 (9th Cir. 1974); *United States* v. *Rizzo*, 418 F. 2d 71, 74 (7th Cir. 1969), cert. denied, 397 U.S. 967 (1970).

c. Petitioner's contention that he had standing to contest the searches of the premises in question by reason of a possessory or proprietary interest in those premises was properly rejected by the district court for failure of proof. As noted, to prove the requisite interest in the premises, petitioner was obligated to show a "legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois, supra,* slip op. 15, citing *Katz* v. *United States, supra,* 389 U.S. at 353. He showed no such interest either in the Spotsylvania County farmhouse or the Essex County shed.

Petitioner introduced no evidence to establish his interest in the searched premises, but instead relied on argument by counsel to the effect that the government would seek to prove at trial that petitioner was the "kingpin" of the PCP manufacturing operation, that he was responsible for setting up manufacturing operations in the Essex County farmhouse and the Spotsylvania County shed, that he had access to and control over both buildings, and that the shed had been rented by his agent. With one exception, petitioner did not even support these assertions with references to specific documents or testimony; and, as noted, he did not testify at the suppression hearing, nor did he present any other witnesses (J.A. 242-276).

Regarding the Essex County shed, petitioner's counsel, who also represented co-defendant Byron Earl Fountaine, argued at the hearing that "investigative reports" provided to him by the government during discovery indicated that the government believed that "this was at least Fountaine's shed, * * * at least Fountaine's operation" (J.A. 252) and that government "allegations" indicated that the shed was Fountaine's, along with "the keys * * * to the lock on the door and the goods * * * inside" (J.A. 267). He also asserted, without specific reference to evidence, that both petitioner and Fountaine had a "possessory or proprietary interest in the shed" and "free access in and out of the shed" (J.A. 252-253). The Assistant United States Attorney denied that the government believed petitioner had any "proprietary or possessory right in the premises" of the house in Spotsylvania County, which he noted "was rented by two women" and owned by a person other than petitioner (J.A. 261). The Essex County shed, he stated, was owned by "another person" and rented by "another person"—not petitioner or Fountaine (J.A. 263).

The district court properly concluded that petitioner had not carried his burden of proving possessory interests in the premises merely by "visiting" them and "alleging some control," since his claims regarding his interest in the premises were "speculative at best" (J.A. 275, 276).

The correctness of the court's ruling was borne out by the evidence at trial. Sandra Swoboda, a tenant in the Spotsylvania farmhouse, testified that petitioner and another person, Andrew Narel, had brought seven boxes into the house sometime in March 1975, that Narel had asked permission to store them in her attic, and that she had reluctantly agreed (Tr. 330-334). Petitioner used contents of the boxes to manufacture PCP in her kitchen, she stated (Tr. 334-335). She further testified, however (Tr. 353), that she told petitioner and Narel "three days and they had to be out" (Tr. 353), and that the two men actually moved the boxes out sometime in the middle of March (Tr. 336-337).

It was stipulated that a Deputy Sheriff for Spotsylvania County would testify that he executed the search warrant for that house on April 5, 1975, and seized from "the

residence" only a single glass bottle and eight newspaper sections containing "white crystals" and two tablespoons containing "white crystalline materials" (Tr. 546-547). It was further stipulated that a chemist would testify that the contents of these items were either PCP or an intermediate product appearing during its manufacture (Tr. 546).

It is thus apparent that even if petitioner had at one time enjoyed a legitimate expectation of privacy in the attic storage area, that expectation ended after he removed the seven boxes. There was nothing to indicate he had any reason to expect that materials he may inadvertently have left behind somewhere in the residence would be undisturbed.

As to the Essex County shed, it was stipulated that the owner would testify that "Butch Walton, Byron Earl Fountaine, and other unidentified individuals" came onto his premises and placed boxes and paint cans "into a shed on his property" and that he had "observed Byron Earl Fountaine on his property on various occasions" (Tr. 688-689). It is conceivable that this would support a Fourth Amendment challenge to the search by Fountaine;[10] but it is clear that it indicates no cognizable interest on the part of petitioner.

Certainly one cannot, as petitioner suggests (Pet. 19), claim a personal Fourth Amendment right on the basis of rights enjoyed by one's co-conspirators on the theory that they are one's agents. *United States* v. *Hunt*, 505 F. 2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975).[11] See also *Alderman* v. *United States*, 394 U.S. 165, 171 (1968).

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[10]Fountaine pled guilty to one count of the indictment.

[11]Petitioner agrees that the Fifth Circuit decision in *United States* v. *Hunt* is "viable" (Pet. 19), but he claims that it is "contrary to the facts of the instant record" (*ibid.*). Petitioner articulates no distinction, and we think that, at least on the question of agency, *Hunt* is squarely in point.

3. Petitioner asserts that he was entitled during his trial to individual voir dire of the jurors to determine whether newspaper publicity had prejudiced them. This contention is baseless. During the jury selection process, one venireman was excused for cause because he had read about the case. After the trial commenced, the district judge advised the jury on many occasions to avoid exposure to media reports about the case, and, if they should read or hear something relevant, to inform the court promptly. Following publication of two newspaper stories relating to the case, the trial judge each time inquired of the jurors whether they had been exposed to publicity regarding the trial; on each occasion, no juror responded. Since no juror had been exposed to trial publicity, further inquiry was unnecessary. See *United States* v. *Jones*, 542 F. 2d 186, 194-197 (4th Cir. 1976); *United States* v. *Hankish*, 502 F. 2d 71, 77 (4th Cir. 1974); *Margoles* v. *United States*, 407 F. 2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969). The court of appeals correctly concluded (Pet. App. 5a-6a) that the trial judge did all that was necessary to ensure a fair trial.

4. Petitioner contends that he should have been afforded a hearing on his claim that some of the government's evidence might have been obtained through the bumper beepers installed on a car and on his airplane. But as an Assistant United States Attorney explained to the district court, neither beeper functioned and thus no evidence was obtained from them. Nonetheless, the trial judge advised defense counsel that he could question the case agent in the prosecutor's presence concerning the beepers; defense counsel never took advantage of this opportunity. Petitioner does not point to any evidence that might have been obtained from the beepers. Furthermore, petitioner had no possessory or

privacy interest in the car, which belonged to his co-defendant's wife, and therefore he could not have challenged the admissibility of any evidence that might have been obtained through surveillance of that vehicle. *Rakas* v. *Illinois*, *supra*. The beeper on his airplane was installed pursuant to court order, and since he makes no claim in this petition that the order was defective or that probable cause was lacking, he has not laid the necessary groundwork for claiming a Fourth Amendment violation.[12] In short, he has shown nothing that would entitle him to a hearing.

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[12]The Ninth Circuit has held that the attachment of a beeper to the exterior of a vehicle does not invade privacy interests protected by the Fourth Amendment unless the attachment involves an intrusion (*e.g.*, entry onto private property) that would otherwise require a warrant, since a beeper lawfully attached to monitor a vehicle's location on the public highways or in the public airspace is simply an aid to visual observations and scarcely more intrusive than other visual surveillance aids, such as radar. *United States* v. *Pretzinger*, 542 F. 2d 517, 520 (9th Cir. 1976); *United States* v. *Hufford*, 539 F. 2d 32, 34 (9th cir.), cert. denied, 429 U.S. 1002 (1976). But see *United States* v. *Holmes*, 521 F. 2d 859, 864-866 (5th Cir. 1975), aff'd en banc by evenly divided court, 537 F. 2d 227 (5th Cir. 1976); United States v. *Frazier*, 538 F. 2d 1322, 1324 (8th Cir. 1976) (dictum), cert. denied, 429 U.S. 1046 (1977). The First Circuit, in United States v. *Moore*, 562 F. 2d 106, 112-113 (1977), has held that, in light of "the lessened expectancy of privacy associated with motor vehicles," law enforcement officers may install a beeper to monitor an automobile's movements without obtaining a warrant, although the court stated that probable cause would be required, While we agree with the Ninth Circuit's view of the matter, this case affords no occasion to resolve any disparity in views among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1979

DOJ-1980-03